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Mailed:
November 18, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re CNS, Inc.

Serial Nos. 76250116; 76250194; 76250611; 76250613¹

Stephen R. Bergerson of Fredrikson & Byron, P.A. for CNS,
Inc.

Yong Oh Kim, Trademark Examining Attorney, Law Office 115
(Tomas V. Vlcek, Managing Attorney).

Before Quinn, Hairston and Kuhlke, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

CNS, Inc. has filed applications to register as
trademarks on the Principal Register the following:

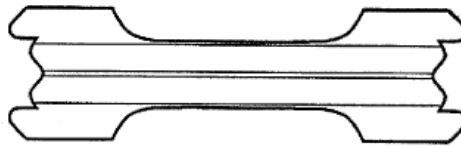


¹ Inasmuch as the issues raised by these four appeals are similar, the Board is addressing them in a single opinion. Citations to the briefs refer to the briefs filed in application Serial No. 76250116, unless otherwise noted; however, we have, of course, considered all arguments and evidence filed in each case.

for "medical device in the nature of a drug-free nasal strip for use as an external nasal dilator" in International Class 10;²



for "transdermal nasal strip for use in the delivery of pharmaceuticals to relieve nasal congestion" in International Class 5;³

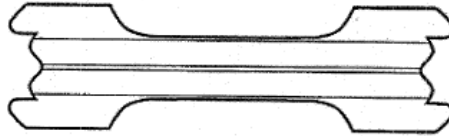


for "transdermal nasal strip for use in the delivery of pharmaceuticals to relieve nasal congestion" in International Class 5;⁴

² Application Serial No. 76250116, filed May 2, 2001, alleging October 19, 1993 as the date of first use and October 22, 1993 as the date of first use in commerce, and describing the mark as "a pictorial representation of a geometric figure comprising an irregular shaped rectangle which has irregular shaped concave sides and includes lines or bands across the rectangle."

³ Application Serial No. 76250194, filed May 2, 2001, alleging October 19, 1993 as the date of first use and October 22, 1993 as the date of first use in commerce, and describing the mark as "a pictorial representation of a geometric figure comprising an irregular shaped rectangle which has irregular shaped concave sides and includes lines or bands across the rectangle."

⁴ Application Serial No. 76250611, filed May 3, 2001, alleging October 19, 1993 as the date of first use and October 22, 1993 as the date of first use in commerce, and describing the mark as "a pictorial representation of a geometric figure comprising an irregular shaped rectangle which has irregular shaped concave sides and includes lines or bands across the rectangle."



for "external nasal dilator" in International Class 10.⁵

The examining attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that applicant's alleged marks are merely descriptive of its goods, and under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, 1127, on the ground that applicant's alleged marks fail to function as trademarks. In maintaining these refusals, the examining attorney also found that applicant did not make a sufficient evidentiary showing of acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f).⁶ In addition, in Application Serial No. 76250611, the examining attorney also refused registration on the ground that applicant failed to submit a specimen that shows use of the alleged mark for the goods identified in the application.

⁵ Application Serial No. 76250613, filed May 3, 2001, alleging October 19, 1993 as the date of first use and October 22, 1993 as the date of first use in commerce, and describing the mark as "a pictorial representation of a geometric figure comprising an irregular shaped rectangle which has irregular shaped concave sides and includes lines or bands across the rectangle."

⁶ The examining attorney initially refused registration under Section 2(e)(5) of the Trademark Act on the ground that the alleged marks are functional, and under Sections 1, 2 and 45 of the Trademark Act on the ground that the marks are non-distinctive configurations. Upon applicant's clarification that

When the refusals were made final, applicant appealed. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusals to register in each application.

Summary of Examining Attorney's Arguments

In maintaining the refusal that the alleged marks fail to function as marks, the examining attorney contends that the alleged marks are used on the packaging for the goods as purely "informational matter that merely apprises consumers of the physical appearance of the goods." Brief p. 3. The examining attorney argues that "manufacturers commonly depict the goods contained within a package on the package itself to show consumers what the product looks like [therefore] consumers will view the pictorial representation for applicant's goods as merely informational matter." Brief p. 3.

With regard to the contention that the alleged marks are merely descriptive of the goods under Section 2(e)(1), the examining attorney argues that applicant's "specimens, advertisements and patents clearly demonstrate that the proposed mark[s] [are] accurate pictorial representation[s] of the goods." Brief p. 6. He concludes that because the

the alleged marks are pictorial representations of the goods, the examining attorney withdrew these refusals.

marks are accurate representations of the involved goods they are descriptive of them. Pointing to a utility patent referenced on applicant's packaging, the examining attorney further argues that because "the alleged mark[s] [are] pictorial representation[s] of the device in the patent and therefore a genus of goods, [they are] highly descriptive, if not generic, representation[s] of the goods." Brief p. 6. Finally, he argues that by claiming acquired distinctiveness applicant has conceded that the alleged marks are merely descriptive.

As to applicant's showing of acquired distinctiveness, the examining attorney stated that because "the proposed mark[s] [are] accurate pictorial representation[s] of the goods, and this precise design of the goods is the subject of a utility patent, the mark[s] [have] a very high degree of description" and applicant "bears a heavy burden to prove that the mark[s] [have] acquired distinctiveness." Brief p. 8. The examining attorney concluded that the showing here was insufficient to support a finding of secondary meaning. Brief p. 13.

Summary of Applicant's Arguments and Evidence

Applicant contends that the examining attorney's refusals are "based on principles of functionality, which are not relevant in this matter." Brief p. 1. Applicant

admits that it owns several patents "regarding the process of opening nasal passages" but argues that "None of the claims within these patents cover Applicant's unique product shape," (brief p. 2) and, in any event, the utility patents and functionality are not relevant to this matter. Brief p. 3. Applicant argues that its alleged marks "show its products to be distinguished from the goods of others" which is an indication that its alleged marks are "fully functioning trademark[s]" (brief p. 4) and applicant uses them "as trademark[s]" (brief p. 5). In the alternative, applicant asserts that its alleged marks have acquired distinctiveness. In support of this assertion, applicant provided: (1) the declaration of Marti Morfitt, applicant's Chief Executive Officer, stating that the alleged mark has become distinctive through exclusive and continuous use of the design in commerce for at least five years; (2) charts showing planned advertising expenditures from 1996 through 2003; (3) a summary of sales in dollar figures from 1993 through 2002; (4) samples of print advertising; (5) samples of television advertising, including a competitor's commercial; and (6) samples of newspaper articles.⁷

⁷ Applicant also attempted to rely upon a prior registration for the mark BREATHE RIGHT with banner background design in support

The record also includes: (1) the declaration of M. W. Anderson, applicant's Vice President of Product Development and Regulatory Affairs; (2) dictionary definitions of the words pharmaceutical and drug; (3) several design patents owned by third parties for external nasal dilators; (4) samples of competitors' products; (5) a sample of applicant's product; (6) three utility patents for external nasal dilators;⁸ and (7) applicant's specimens of use.⁹

of its assertion of acquired distinctiveness. However, this registration was cancelled under Section 8 on May 17, 2003, nearly two years before applicant filed its brief, and cannot be the basis for such a claim. *In re BankAmerica Corp.*, 229 USPQ 852, 853 (TTAB 1986); TMEP 1212.04(d). Moreover, the mark in that registration is not even remotely similar to support a claim of acquired distinctiveness based on a prior registration.

⁸ One utility patent was submitted by applicant in response to the request made in the first Office action. The other two, notably patent no. 5533503, were only submitted in response to a specific follow up request from the examining attorney based on the patent numbers appearing on the specimens of use. Not surprisingly, the drawing of the product in utility patent no. 5533503 closely resembles the alleged mark.

⁹ The print-outs from the Trademark Electronic Search System (TESS) of third-party registrations for various product configurations attached to applicant's reply brief are untimely. Trademark Rule 2.142(d); *In re Posthuma*, 45 USPQ2d 2011, 2012 n. 2 (TTAB 1998). In any event, third-party registrations are not probative inasmuch as prior decisions of other examining attorneys are not binding upon the Office and the Board must decide each case on its own facts and record. *In re International Taste Inc.*, 53 USPQ2d 1604 (TTAB 2000); *In re Consolidated Foods Corp.*, 200 USPQ 477 (TTAB 1978).

Discussion

Failure to Function Under Sections 1, 2 and 45

As has been frequently stated, "Before there can be registration, there must be a trademark." *In re Bose Corporation, d/b/a Interaudio Systems*, 546 F.2d 893, 896, 192 USPQ 213, 215 (CCPA 1978). See also *In re International Spike, Inc.*, 196 USPQ 447, 449 (TTAB 1977) (law pronounced in the *Bose* case is just as applicable to pictures and illustrations as it is to words; Trademark Act is for the registration not the creation of trademarks); *In re Ratcliff Hoist Co., Inc.*, 157 USPQ 118, 119 (TTAB 1969) (mere representation of an article of applicant's merchandise fails to function as a trademark for its goods).

In Application Serial Nos. 76250116 and 76250194, the alleged marks appear on the front of the box next to the wording "Mentholated Vapors In Every Strip" and on the bottom spine of the box. In Application Serial Nos. 76250611 and 76250613, the alleged marks purportedly appear on the back of the box in an overlapping pattern for the different available sizes.

The examining attorney relies on *In re International Spike, Inc., supra* at 449 (TTAB 1977) for his analysis, noting the similarities between the cases, in particular,

the impact on consumer perception when the pictorial representation is also used on an instruction sheet included in the packaging and the evidence that the applicant did not intend that the alleged mark function as a trademark. *See International Spike, supra* at 449-450 (pictorial representation depicted next to words "How to Use for Trees" and use of TM with other marks on the carton indicate "that customers and prospective purchasers would not look upon the picture as a symbol of origin or as anything except as part of the illustration of how to use the goods, which are fertilizer sticks manufactured in the form of spikes for ease in hammering them into the ground"). Specifically, the examining attorney argues that the "informational nature of the proposed mark is reinforced in the minds of consumers by applicant's own instruction sheets in which the alleged marks appear in illustrations demonstrating the proper method of affixing and removing the goods from the user's nose." Brief p. 3. With regard to the latter point, the examining attorney highlights that "a federal registration symbol appears next to BREATHE RIGHT, VICKS, and CNS and design, and a TM symbol appears next to BREATHE RIGHT RIGHT NOW, yet no such designation appears next to the alleged mark on either the packaging or the instruction sheet." Brief p. 4.

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We find that the manner in which the alleged marks are used on the specimens of use in these applications is not indicative of trademark use.

With regard to Application Serial Nos. 76250611 and 76250613, we cannot even say that the alleged marks depicted in the drawing pages of the applications are represented on the specimens as depicted in the overlapping format. To the extent the alleged marks are depicted on the specimens, they are devoid of any trademark significance, appearing on the back of the box away from consumer view, and used to inform the consumer as to the contents of the box and the different available product sizes. With regard to Application Serial Nos. 76250116 and 76250194, the specimens of use show the alleged marks on the bottom front of the box next to the descriptive wording "Mentholated Vapors in Every Strip" and without a TM symbol in contrast to all of the trademarks appearing on the box which are accompanied by either the federal registration symbol or the TM symbol.¹⁰ The other locations are on the spine of the box, which would typically not be visible to the consumer, and the back of the box as part of an illustration depicting how it is used on the nose. Simply

¹⁰ While the lack of a TM symbol is not determinative, the use of a TM symbol might have lent support to show applicant's intent

put, the manner in which these alleged marks are being used does not support a finding that potential consumers would perceive these two-dimensional pictorial representations as trademarks or source identifiers.

Merely Descriptive Under Section 2(e)(1)

A pictorial or visual representation that consists merely of an illustration of the goods or services, or of an article that is an important feature or characteristic of the goods or services is merely descriptive under Section 2(e)(1) of the Trademark Act. See *In re Society for Private and Commercial Earth Stations*, 226 USPQ 436 (TTAB 1985) (representation of satellite dish held merely descriptive of services of an association promoting the interests of members of the earth station industry); *In re Underwater Connections, Inc.*, 221 USPQ 95 (TTAB 1983) (pictorial representation of a compressed air gas tank held merely descriptive of travel tour services involving underwater diving); *Thistle Class Assoc. v. Douglass & McLeod, Inc.*, 198 USPQ 504, 511 (TTAB 1978) (representation of a thistle held merely descriptive of sailboats); *In re Custom Trim Products, Inc.*, 182 USPQ 235 (TTAB 1975) (representation of protective molding on vehicle being

for these pictorial representations to function as trademarks. See *International Spike, supra*.

struck by opening car door). See also *Planters Nut & Chocolate Co. v. Crown Nut Co., Inc.*, 305 F.2d 916, 134 USPQ 504, 507 (CCPA 1962) (a visual representation which consists merely of an illustration of one's product is unregistrable under Section 2(e)(1) of the Act just as merely descriptive word); and TMEP § 1209.03 (4th ed. 2005).

The analysis under this refusal focuses on the degree of accuracy of the depiction. Where the design is more realistic and leaves no doubt about the depiction of the goods or services it is deemed merely descriptive. *In re Eight Ball, Inc.*, 217 USPQ 1183 (TTAB 1983) (representation of a cue stick and eight ball); *International Spike, Inc.*, *supra* at 450 (representation of a man holding a hammer and applicant's product); *In re AMF Inc.*, 181 USPQ 848 (TTAB 1974) (representation of two sailboats held merely descriptive but secondary meaning established).

Conversely, where there is sufficient stylization to lessen the degree of accuracy the representation may not be merely descriptive. See *In re LRC Products Ltd.*, 223 USPQ 1250 (TTAB 1984) (stylized hand design found not merely an illustration of gloves; thus not merely descriptive); *In re Curtiss-Wright Corp.*, 183 USPQ 621, 622 (TTAB 1974) (representation of rotary engine found arbitrary and not merely descriptive). See also TMEP §1209.03

In this case, we find that applicant's alleged marks are accurate illustrations of applicant's goods and, as such, are merely descriptive. Applicant, has, in fact, conceded this point by seeking registration under Section 2(f), *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 1575, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988), and by its own statements that the alleged marks are "the shape of the product." Reply Brief p. 2. However, for completeness, we also find this determination is supported by the evidence of record. First, the sample of applicant's product and the drawings of the product in utility patent no. 5533503, show that the alleged marks are an accurate representation of the goods. Second, the design patents for external nasal dilators and samples of competitors' external nasal dilators that also have a thinner central band with wider end regions support a finding that this is generally a common shape for these goods and, therefore, these designs lack inherent distinctiveness. *Cf. In re Pacer Technology*, 338 F.3d 1348, 67 USPQ2d 1629 (Fed. Cir. 2003).

Acquired Distinctiveness Under Section 2(f)

Refusals based on descriptiveness and failure to function may be overcome by a showing of acquired distinctiveness under Section 2(f) of the Trademark Act.

The burden of proving a prima facie case of acquired distinctiveness in an ex parte proceeding rests with applicant. *Yamaha*, supra at 1576, 1004. An applicant must show that the primary significance of a pictorial representation of the product in the minds of consumers is not the product but the source of that product to establish acquired distinctiveness. See *In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005); *In re Ennco Display Systems Inc.*, 56 USPQ2d 1279, 1283 (TTAB 1983). Acquired distinctiveness may be shown by direct and/or circumstantial evidence. Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence is evidence from which consumer association might be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers. *In re Ennco*, 56 USPQ2d at 1283. See also 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, Sections 15:30, 15:61, 15:66 and 15:70 (4th ed. 2005).

There is no fixed rule for the amount of proof necessary to demonstrate acquired distinctiveness, however, the burden is heavier in this case because of the accuracy of the two-dimensional pictorial representations of the

goods. See *Yamaha*, 840 F.2d at 1581, 6 USPQ2d at 1008 (evidence required to show acquired distinctiveness is directly proportional to the degree of non-distinctiveness of the mark at issue). Cf. *In re Ennco*, 56 USP2d 1279 (TTAB 1983) (product configurations face a heavy burden to establish secondary meaning).

In this regard, we note that the examining attorney supports his position that the alleged marks in issue are highly descriptive marks and applicant bears a heavy burden to establish secondary meaning, in part, by relying on the utility patents, in particular patent no. 5533503. As noted above, applicant takes issue with the relevancy of the utility patents in the absence of a functionality refusal. We find that, under these circumstances where the refusal is based on descriptiveness under Section 2(e)(1), the utility patent is relevant evidence to show the accuracy (descriptiveness) of the depiction of the product in the pictorial representations, in the same way a sample of the product is useful evidence by which to determine the accuracy of the depiction. This, in turn, affects the burden of proof necessary to establish acquired distinctiveness, as the degree of accuracy

(descriptiveness) increases, the burden to establish acquired distinctiveness increases.¹¹

¹¹ Although a functionality refusal is not before us, inasmuch as the examining attorney withdrew that refusal, we note that other cases involving two-dimensional pictorial representations were based on functionality refusals. See *In re Universal Filters Inc.*, 218 USPQ 456 (TTAB 1983) (refusal to a visual representation of the applicant's goods based on the ground that it was functional, evidence included a utility patent; Board found that because the design was different from the patent drawings and from the actual product it was not functional). See also *In re Pingel Enterprise*, 46 USPQ2d 1811, fn. 5 (TTAB 1998) ("However, for purposes of determining the issues of de jure functionality and acquired distinctiveness, it simply makes no difference in this appeal whether we regard the matter which applicant seeks to register, as shown on the drawing submitted with the application, as either the product configuration of applicant's petcock or a 'logo' thereof."); *In re Lighting Systems, Inc.*, 212 USPQ 313 (TTAB 1981) (mark described as a facsimile of a portable, electric flashlight and used by applying it to the box, refused as functional); *Textron Inc. v. Pilling Chain Co., Inc.*, 175 USPQ 621, 622 (TTAB 1972) ("It is a well established precedent that one may not claim a right to registration in the configuration or illustration of a purely functional item..."; illustration of functional zipper unregistrable). Clearly, the case law supports the conclusion that if the product configuration is functional and unregistrable, then the accurate depiction of that configuration is also unregistrable. See also 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, Section 7:37 (4th ed. 2005) ("if a picture of a functional and utilitarian product is regarded as the equivalent of the utilitarian shape itself, the picture should not be capable of appropriation as a trademark for one seller of that product.")

We further note, in this regard, that, applicant's arguments to the contrary, the claims in utility patent no. 5533503, include aspects that may affect the configuration of the product. For example, claim no. 13 "...the end edges of the first and second end regions are shaped with radius corners to prevent inadvertent peeling of the strip of base material from the outer wall tissue of the first and second nasal passage"; claim no. 14 "...a pair of spaced, first and second extensions, the first and second extensions being located outboard and extending past the first and second protrusions, respectively, to prevent inadvertent peeling of the strip of base material from the outer wall tissue of the first and second nasal passages"; and claim no. 19 "wherein there is another extension included in each said end region also extending past said other portion of

We emphasize that even without these utility patents, the record does not support registration (i.e., the accuracy of the depiction is born out by the sample of the product, see *supra*, and the evidence submitted in support of the claim of acquired distinctiveness is insufficient even at a lower threshold, see *infra*).

After careful review of the evidence of record, we agree with the examining attorney that applicant's evidence of acquired distinctiveness is insufficient to permit registration of the accurate two-dimensional pictorial representations of applicant's goods under Section 2(f).

1. Advertising and Sales

Applicant claims to have \$425 million in sales of the external nasal dilators during the period 1993 through 2002 and to have spent approximately \$59 million on advertising between 1996 and 2001.

While the sales volume figures may demonstrate the growing popularity of the product, mere figures demonstrating successful product sales are not probative of purchaser recognition of a two-dimensional representation of the product as an indication of source. See *Braun Inc.*

that said end region, said other portion in a said corresponding end region being positioned between those said extensions therein to thereby form a primarily concave opening between said extensions" dictate that each end has extensions that are longer than the center strip and combine to create a concave appearance.

v. Dynamics Corp., 975 F.2d 815, 827, 24 USPQ2d 1121, 1133 (Fed. Cir. 1992) (“[L]arge consumer demand for Braun’s blender does not permit a finding the public necessarily associated the blender design with Braun.”); *In re Bongrain Int’l (American) Corp.*, 894 F.2d 1316, 1318, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990) (growth in sales may be indicative of popularity of product itself rather than recognition as denoting origin). It is well established that compelling sales and advertising figures do not always amount to a finding of acquired distinctiveness. See *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (\$85,000,000 in annual sales revenues and \$2,000,000 in advertising expenditures found insufficient to establish acquired distinctiveness); *Goodyear Tire & Rubber Co. v. Interco Tire Corp.*, 49 USPQ2d 1705 (TTAB 1998) (\$56,000,000 sales revenues and 740,000 tires sold insufficient to show acquired distinctiveness of tire tread design).

Although there may have been substantial sales and spending on advertising, the more important question is how is the alleged mark being used, i.e., in what manner have consumers been exposed to the alleged mark so that we can impute consumer association between the two-dimensional pictorial representation of the product and the product

producer.¹² To determine whether an accurate two-dimensional pictorial representation of the goods has acquired distinctiveness, advertisements must show promotion of the two-dimensional pictorial representation as a trademark.

Here, there is nothing of record that shows that the alleged marks are being promoted as source indicators. Much of the advertising of record does not even depict the accurate pictorial representations for which registration is sought, but rather consists of photographs or film footage of the goods themselves at different angles in use on a face or being handled. Other examples simply show a picture of the packaging where the alleged marks are not used in a trademark manner, *see supra*. Moreover, as the examining attorney stated "there is no indication from the print advertisements themselves that the proposed mark is being promoted as anything other than a pictorial representation of the goods" rather "the print advertisements ... demonstrate how the product is utilized, i.e., attached over the nose of the user" and are "not

¹² We note that the examining attorney correctly points out that the sales and advertising figures may be somewhat overstated in that some of them are "projected" figures and not actual figures, and the advertising budget includes radio advertising that is "immaterial in determining secondary meaning" in a pictorial representation.

directed at creating secondary meaning in the proposed mark[s]." Brief p. 10.

While applicant argues that its product design is a "prominent element within its advertising and packaging" (brief p. 2) and that it has spent "hundreds of millions of dollars in promoting the unique shape of its product to aid in consumer recognition" (brief p. 2), as noted above, there is nothing in the record to show that the advertising promotes the two-dimensional pictorial representations in a way that would imbue them with source-identifying significance, but rather as the advertising informs the consumer that the trademark is BREATHE RIGHT it also shows the product like any advertising would and perhaps attempts to dispel any reluctance a consumer might have wearing this product in public by placing it on famous faces.

Applicant has not presented evidence of advertising or promotional efforts that focus upon the trademark significance of the two-dimensional pictorial representations claimed as marks and as such has failed to demonstrate that consumers recognize the alleged marks as anything but pictorial representations of the goods.

2. Unsolicited Publicity

The examples of unsolicited publicity for applicant's products do not serve to show customer perception of the

two-dimensional pictorial representations as trademarks. One example is the following, "...Wayne Gretzky, has been seen wearing a Breathe Right." Drug Store News, February 20, 1995. This pertains only to the name Breathe Right, not to the claimed marks herein. While these articles may be evidence of the popularity of the product, they do not show customer recognition of the source identifying significance of the pictorial representations of the product, nor can we infer such recognition from this evidence. The following are several examples: "Well maybe you might look goofy, but this is becoming a status symbol," Physician and Sportsmedicine (August 1995); "...it remains to be seen if kid-size Breathe Right strips will cross the fashion line from silly to cool," The Washington Post, Style section p. C13 (November 10, 2000); "Personally I thought the strip was silly looking so I would not wear it out in public," The Denver Post, "Colorado Kids" (November 21, 2000); and "Although the strip looks very silly, it seems to help," The Plain Dealer, (October 16, 2000); "Over 30 percent of households trying the product come back and buy it again...[b]ut the company's biggest challenge is that although they have achieved a very high recognition of the product, people are not sure what it does." Medical Industry Today, Interview

of Paul Laufer analyst at Principal Financial Securities (January 31, 1997). Finally, in another example, applicant notes the following excerpt: "total brand awareness is in the neighborhood of 80 percent of the country." Drug Store News (July 23, 2001). The brand discussed in the article is the BREATHE RIGHT name ("the Breathe Right brand is only seven years old").

While there is at least one example that references the shape of the product, see, for example, "The butterfly-shaped adhesive bandage stretches across the nose just below the bridge and fits snugly onto each side crease" Physician and Sportsmedicine (August 1995), this is not relevant to the two-dimensional marks involved in this case.

3. Licensing Agreements

As to applicant's argument that secondary meaning is shown through its licensing agreements, it is not supported by the evidence. Applicant directs us to an article from "Drug Store News" attached in Exhibit G wherein its marketing and licensing arrangements with other companies are discussed. The article explicitly states that applicant "is exploring new opportunities to license the Breathe Right name..." This evidence contains no reference

to or use of the marks involved herein and, thus, is of no probative value.

4. Declaration of Use

With respect to applicant's declaration of substantially exclusive use for a period of five years immediately preceding filing of an application, while this may serve as prima facie evidence of acquired distinctiveness, the language of the statute is permissive and the weight to be accorded this kind of evidence depends on the facts and circumstances of the particular case. See Section 2(f) of the Trademark Act 15 U.S.C. Section 1052(f).

Accordingly, based upon consideration of all the evidence in the record, we find that applicant has failed to establish that the two-dimensional pictorial representations involved in the applications before us have acquired distinctiveness within the meaning of Section 2(f).

Specimen of Use

Finally, in Application Serial No. 76250611 the examining attorney also refused registration on the basis that the specimen of use did not support the identification of goods in international class 5 inasmuch as the specimen indicates that the goods are drug free. Brief p. 9.

Applicant argues that the specimen "reflects a product that is a nasal dilator which contains and delivers 'VICKS® mentholated vapors' to consumers to help relieve nasal congestion." Response p. 21. Applications for registration under Section 1(a) of the Trademark Act must include one specimen showing use of the mark as used on or in connection with the goods identified in the application. 15 U.S.C. Section 1051(a)(1); 37 C.F.R. Section 2.56(a). The identification of goods ("transdermal nasal strip for use in the delivery of pharmaceuticals to relieve nasal congestion") indicates that the product is infused with a pharmaceutical. Contrary to applicant's assertion, the specimens submitted in support of *this* application do not include any reference to mentholated vapors or any other type of pharmaceutical and, in fact, include the statement that they are drug free.¹³ Thus, the examining attorney correctly determined that the specimens of use are not acceptable in this application.

Decision: The refusals to register the pictorial representations claimed as marks in each application on the

¹³ We note the specimens of use in Application Serial No. 76250194 do make reference to mentholated vapors and those specimens were accepted by the examining attorney in support of the goods in international class 5. These specimens may not be used to support another application unless submitted in the other application; and, in any event, Application Serial No. 76250194 depicts a different mark.

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grounds that the pictorial representations are merely descriptive, fail to function as marks and have not been shown to have acquired distinctiveness are affirmed. The refusal to register the pictorial representation in Application Serial No. 76250611 on the basis that the specimen of record does not support the identified goods is affirmed.